No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR PETITIONER

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December 19, 2017

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REPLY BRIEF FOR PETITIONER

The government agrees that the sole question presented in this case, concerning the proper interpretation of the stop-time rule, is the subject of an entrenched circuit conflict. Opp. 18-19. And the government does not dispute that this conflict will persist unless this Court intervenes, or that the question presented is of "exceptional importance" and arises frequently, as explained by *amicus* American Immigration Lawyers Association ("AILA"). AILA Br. 2, 7-8. Until this Court resolves the conflict, the accident of geography will bar some deserving immigrants, but not others, from even *applying* for one of the most important forms of relief available under immigration law.

Despite the certworthy conflict, the government opposes certiorari, arguing that it will likely win on the merits and that even if it does not, Mr. Pereira will likely lose on other grounds. Neither prediction is well founded, and neither is a valid reason to leave the circuit split unresolved. The government's speculation about what would happen *if* Mr. Pereira were allowed to seek cancellation of removal falls particularly flat. Once the immigration judge ("IJ") found Mr. Pereira ineligible for cancellation, he denied Mr. Pereira the opportunity even to *submit a cancellation application*. Neither the court below nor any immigration court has ever looked at the merits of Mr. Pereira's claim for cancellation. The question presented asks only whether Mr. Pereira is *eligible* to seek such a merits determination. This Court should proceed to answer that question, rather than assume from an undeveloped record that eligibility for relief

would do Mr. Pereira no good. That is the course the government itself has repeatedly taken in supporting certiorari review of questions that bear on eligibility to seek relief.

The government devotes the vast majority of its opposition to arguing that the Board of Immigration Appeals ("BIA") correctly resolved the merits. Opp. 9-18. But even if that were right—and it is not—it would not be a reason to deny certiorari and leave in place an entrenched circuit conflict. Further, as explained in the petition (at 21-31) and below (at 8-12, *infra*), and as the Third Circuit held in *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016), the BIA's interpretation directly conflicts with the statute's unambiguous text.

The Court should resolve the conflict.

I. The Court Should Grant Certiorari To Resolve The Acknowledged Circuit Conflict On An Important And Frequently Recurring Issue.

A. The Government Concedes That The Question Presented Is Certworthy.

1. As the petition explained (at 17-18), and the government concedes (at 18-19), there is a clear circuit conflict concerning the question presented. Two courts of appeals originally held that service of a document that does not include the information required by the definition of a "notice to appear" in 8 U.S.C. § 1229(a) does *not* trigger the stop-time rule.[1]

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[1] *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005).

The BIA disagreed, concluding that service of such a document *does* trigger the stop-time rule.[2] Five courts of appeals have now deferred to the BIA's decision, including the two courts that had originally reached the opposite conclusion.[3] The Third Circuit considered, and disagreed with, these courts, holding that the BIA's interpretation conflicts with the statute's unambiguous text.[4] And now the First Circuit has explicitly disagreed with the Third Circuit. Pet. App. 7a-9a.

The government does not dispute that the conflict will persist until this Court intervenes. *See* Pet. 18. In particular, the government rightly does not argue that the Third Circuit might change its mind, because further percolation in that circuit is impossible. Within the Third Circuit, immigrants situated identically to Mr. Pereira currently have their cancellation applications adjudicated on the merits, because the immigration courts in that part of the country follow the Third Circuit's decision in *Orozco-Velasquez*. And the immigration courts' decisions in such merits adjudications will not be reviewable by the Third Circuit: the government cannot petition for review of a BIA decision to grant relief, and a respondent cannot seek review of the BIA's discretionary decision to deny cancellation. *See* 8 U.S.C. § 1252(a)(2)(B). Without this Court's intervention,

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[2] *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011).

[3] *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1082-83 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 238-40 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 434-35 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670, 674 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014).

[4] *Orozco-Velasquez*, 817 F.3d at 82-86.

the circuit conflict, and the obvious inequities it creates, *see* Pet. 17-18, will continue.[5]

2. The government also does not contest that the circuit conflict at issue in this case is of "exceptional importance" and recurs frequently. *See* Pet. 19; AILA Br. 7-13. The effect of the decision below, and those like it, is to deny cancellation of removal even to immigrants who would otherwise qualify for that relief based on "exceptional and extremely unusual hardship" to an immediate relative. And because there is a separate stop-time rule for commission of many crimes, 8 U.S.C. § 1229b(d)(1)(B), the immigrants affected by *this* stop-time rule are likely to be those who, like Mr. Pereira, have no criminal history of any significance. Pet. 19. As AILA explains (at 9-13), for those immigrants and their families the question presented is "deeply important and life-altering." Cancellation eligibility means permanent residence in the United States, while ineligibility means deportation and separation from U.S.-citizen and lawful-permanent-resident family members, an extreme measure that this Court has analogized to criminal punishment. *See* AILA Br. 10-11.

Furthermore, the interpretive question presented here has repeatedly been outcome-determinative: it has generated seven published appellate decisions in the last three years alone, in addition to many unpublished decisions. Pet. 19; AILA Br. 7-8. In AILA's experience it is "common practice" for the gov-

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[5] The government thus does not argue that the Court should wait until another circuit joins the Third and compounds the inequity. This Court regularly validates the position of one circuit in a split, especially in the immigration context. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.6 (2011).

ernment to serve "notice lacking the statutorily required date and time," and "it can be years from the time a noncitizen receives a deficient notice until he actually receives a hearing date." AILA Br. 7. Frequently, therefore, the government fails to meet the statutory definition and trigger the stop-time rule until after the immigrant satisfies the relevant residence requirement. AILA Br. 7-8.

B. The Courts Below Decided Only The Eligibility Question That Has Split The Circuits, Preventing Mr. Pereira From Building A Record On Whether He Will Win Relief If Eligible.

The government's only argument about the certworthiness of this case (as opposed to the merits) is that Mr. Pereira "likely" cannot show that his removal would cause sufficient hardship to his four- and nine-year-old U.S.-citizen daughters. Opp. 19-20. But the mere possibility that the government might win a particular case on alternative grounds after losing in this Court is not a persuasive reason to deny review of a pressing, certworthy legal issue that is properly presented. And it is especially unpersuasive here, as the government's "alternative" ground is actually linked to the resolution of the question presented. Because of the circuit in which Mr. Pereira's case originated, he was deemed ineligible to seek cancellation and *barred* from adducing the evidence that could show he deserves to receive it. Having deprived him of any opportunity to bat, the government cannot now complain that the record does not show whether he would have gotten on base.

1. The government's vehicle objection is particularly meritless given that the IJ did not even allow Mr. Pereira to *submit* an application for relief. *See* Pet. App. 23a (IJ refusing to allow Mr. Pereira "to submit an application for cancellation of removal"). Rather than speculate concerning how the IJ would evaluate a future cancellation application, this Court should grant certiorari to resolve the circuit conflict concerning whether Mr. Pereira is eligible to apply for cancellation *at all*.

2. This Court frequently grants certiorari in cases concerning *eligibility* for relief even where it is not clear the immigrant would ultimately merit relief. For instance, in *Holder v. Gutierrez*, 566 U.S. 583 (2012), the Ninth Circuit held that the immigrants satisfied the same period-of-residence requirement at issue in this case and remanded for the BIA to adjudicate the cancellation applications on the merits. *Id.* at 590. The *government* successfully sought certiorari even though the IJ might well have denied cancellation on remand. Far from viewing that possibility as a vehicle problem, the government's reply brief in support of certiorari identified multiple other cases in which this Court had granted certiorari "petitions by aliens from decisions restricting eligibility for discretionary relief" before entitlement to relief had been adjudicated. Gov't Cert. Reply Br. at 11, *Gutierrez, supra* (Nos. 10-1542 and 10-1543) (citing *Judulang v. Holder*, 565 U.S. 42 (2011), and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 571 (2010)).

The government was right about *Judulang* and *Carachuri-Rosendo*: the grants of certiorari in those cases further undermine the government's vehicle argument. In *Judulang*, this Court granted certiora-

ri to resolve a lopsided split concerning eligibility for relief under the predecessor to the cancellation-of-removal statute, even though the government's opposition to certiorari suggested the petitioner might not merit relief as a matter of discretion. *See* Gov't Br. in Opp. at 16 n.8 (No. 10-694). In *Carachuri-Rosendo*, the government did not even make that argument. The question was whether a particular criminal conviction rendered an immigrant ineligible for cancellation of removal. 560 U.S. at 571. Without suggesting that the petitioner had a particular likelihood of obtaining cancellation if found eligible, the government acquiesced in certiorari, describing the case as "an appropriate vehicle" to resolve the eligibility question. Br. for the Respondent at 16 (No. 09-60). In those cases, a stark split on eligibility for relief could not be brushed aside on the theory that *nobody* would qualify for relief anyway. So too here.

3. Even the current, undeveloped record suggests that Mr. Pereira will make a strong case that his removal will create sufficient hardship for his U.S.-citizen daughters. Though the standard for cancellation is high, it does not require that the harm be "unconscionable," nor is it "so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Matter of Recinas*, 23 I. & N. Dec. 467, 468, 471 (BIA 2002). Instead, the applicant must show, based on balancing numerous factors, that a qualifying relative would "suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure." *Id.* at 468.

The record already shows that Mr. Pereira is not just a loving and involved father, but also the breadwinner for his four- and nine-year-old children, who were born in the United States and have lived their whole lives here. Even these facts are analogous to those on which the BIA has relied in finding sufficient hardship. *Recinas*, 23 I. & N. Dec. at 470-73 (noting, among other things, that the applicant's children "kn[e]w no other way of life" than living in the United States and were "entirely dependent" on the applicant for support). Mr. Pereira could submit significantly more evidence concerning hardship to his daughters if he were allowed to apply for cancellation.

The government's professed doubt that Mr. Pereira could show sufficient hardship to his U.S.-citizen daughters thus creates no vehicle problem. The Court should resolve the circuit conflict concerning whether Mr. Pereira can even *try* to make that showing.

II. The Government's Merits Arguments Provide No Reason To Deny Certiorari And Cannot Overcome The Clear Statutory Text.

The government spends most of its opposition arguing why the BIA was right. Opp. 10-18. Whatever the merits of these arguments, they provide no reason for this Court to leave in place an entrenched circuit conflict. And the government's arguments are wrong in any event—the government cannot overcome the clear statutory text, which triggers the stop-time rule only upon service of a "notice to appear *under § 1229(a)*," a provision that defines a "no-

tice to appear" as a document with specific *substance*, not just a specific title. 8 U.S.C. § 1229d(1) (emphasis added).

1. The government's primary argument is that the statute must be ambiguous because the word "under" has "many dictionary definitions." Opp. 11 (quoting *Ardestani v. United States*, 502 U.S. 129, 135 (1991)). But that does not mean that every statute using "under" *must be* ambiguous. *E.g.*, *Mead Corp. v. Tilley*, 490 U.S. 714, 722-23 (1989) (phrase "benefits under the plan" "can refer only to" one particular allocation of benefits). Rather, the word "draw[s] its meaning from context," Opp. 11 (quoting *Ardestani*, 502 U.S. at 135), and in *this* context, the word "under" creates no ambiguity.

The cases on which the government relies all involve questions concerning when conduct is carried out "under" a particular statutory provision. *E.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 531 (2013) (interpreting a copyright provision governing copies "lawfully made under this title"); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40 (2008) (interpreting a bankruptcy provision governing the "making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title"). Here, by contrast, the statute triggers the stop-time rule only on service of a "notice to appear under" a provision that not just regulates the government's conduct, but *specifically defines the term "notice to appear."* A document that flunks the notice-to-appear definition in § 1229(a) simply cannot be a "notice to appear under § 1229(a)." Of course, the government can "call[]" anything—even an otherwise-blank piece of paper—a

"notice to appear," Opp. 12, but that does not make it a "notice to appear *under § 1229(a)*" when § 1229(a) gives the term a specific, substantive meaning.

The government seems to acknowledge that a notice must meet at least *some* of the substantive requirements from § 1229(a)'s definition to qualify as a "notice to appear under § 1229(a)." *Compare* Opp. 14 *with* 8 U.S.C. § 1229(a)(1)(A)-(E). But the government can only distinguish among the elements of the definition with a baldly atextual appeal to statutory "purpose," whereby some elements matter and some do not. Opp. 13, 14. On that basis, the government argues (at 14) that "[n]othing in the stop-time rule indicates that the absence of a specific date and time makes the initiating document" flunk the statutory definition. That is, nothing *except the plain statutory text*. If paragraphs (A)-(E) are mandatory, paragraphs (F) and (G) are too, and for the same textual reasons. The only plausible reading of the statute is that a "notice to appear" must contain *all* of the information listed in § 1229(a)'s definition.

2. The government's statutory-structure arguments are similarly unpersuasive. It is irrelevant that § 1229(d)(1) cross-references the subsection (§ 1229(a)), rather than the paragraph (§ 1229(a)(1)), that includes the notice-to-appear definition. *See* Opp. 14-15. Congress often uses cross-references that are not as specific as they could be. *E.g.*, 18 U.S.C. § 2119(2) (cross-referencing definition in "section 1365" when definition is in § 1365(h)(3)); 42 U.S.C. § 7661(2) (cross-referencing definition in "section 7412" when definition is in § 7412(a)(1)).

The *in absentia* provision on which the government relies (at 14-16) is not analogous to the stop-time

rule. The former provision needed to identify paragraphs (1) and (2) specifically in order to reference *both* types of notice: not just a "notice to appear," but also any notice of a change in hearing time or place under paragraph (2). The *in absentia* provision also required a phrase like "in accordance with," rather than a phrase like "under," because there is no defined term for the notice described in paragraph (2). *See* Opp. 15-16.

3. The government over-reads the legislative history. Opp. 16-17. Its citations show only that Congress did not want immigrants to be able to extend their qualifying residence period by deliberately failing to appear at their removal proceedings. But an immigrant cannot fail to show up at a hearing *until one is scheduled* and notice of the date and time is sent. So long as the government properly serves notice of the time of the initial hearing, along with the other information identified in the notice-to-appear definition, the residence period ends under § 1229(d)(1) without regard to whether the immigrant actually appears. It is only when the hearing notice is not properly "served"—as here, where the immigration court *undisputedly* sent the first hearing notice to the wrong address, through no fault of Mr. Pereira's, Pet. 13; Opp. 5-6; A.R. 133-34—that the residence period can continue through an *in absentia* removal proceeding.[6] Notably, the government does not even try to argue that the misdirected hearing notice stopped the clock; instead, it argues that the time stopped more than a year earlier, when

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[6] Even under those circumstances, the clock may already have stopped if the immigrant has committed a qualifying crime. 8 U.S.C. § 1229b(d)(1)(B).

Mr. Pereira was told he would have to appear "on a date to be set at a time to be set." A.R. 217. Nothing in the legislative history suggests that Congress wanted to end the period of continuous residence for immigrants before the government even set a hearing that could be ducked or delayed.

4. Given that the statutory text is unambiguous, the government's reliance on agency deference (at 17-18) is unavailing. *See* Pet. 31. Even if the statute were somehow ambiguous, the agency's interpretation would still fail. It is not the better reading of the statute—it had failed to convince a single court of appeals before the BIA's decision—and this Court should not adopt it just because an executive agency has. Pet. 22 n.4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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